United States Department of Agriculture
FARM CREDIT ADMINISTRATION
Washington, D. C.

SUMMARY OF CASES

RELATING TO

FARMERS' COOPERATIVE ASSOCIATIONS

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Income Taxes-- Patronage Dividends Held Not Deductible

In the unreported case of Gallatin Farmers Company, Petitioner v. Commissioner of Internal Revenue, Respondent, Docket No. 107778, the United States Board of Tax Appeals, now the Tax Court of the United States, upheld the ruling of the Commissioner refusing to allow the Company to deduct $798.00 as interest in 1938 and also in 1939, in computing its income taxes, and the action of the Commissioner of Internal Revenue in refusing to allow the Company to deduct $3,485.93 disbursed as patronage dividends in computing its income taxes for 1939. The books of the Company were kept on an accrual basis.

It appeared that the Company had amended its articles of incorporation to provide for the issuance of preferred stock and in the resolution which was adopted by the stockholders for that purpose it was stated that it was "understood and explained that the preferred stock would be a debt of the Corporation, the dividend to be in the form of interest payable annually regardless of earnings, and that the Board of Directors could issue the preferred stock as they deemed necessary, and redeem it as the finances of the Corporation permitted." The stock, however, was issued in the normal way and there was nothing on the face of the stock certificates to indicate that they evidenced anything but preferred stock. Under the circumstances the Tax Court of the United States held that amounts which had been disbursed by the Company out of earnings on account of the preferred stock were not interest but dividends, and hence were not deductible in computing its income taxes. In some instances where the facts differed from those in the case under discussion, it has been held that dividends are simply interest (see Garden Homes Company v. Commissioner of Internal Revenue, 64 F. 2d 593, Summary No. 17, page 11, 12 and 15).

The Tax Court of the United States said:

> The second issue is whether respondent erred in disallowing $3,485.93 of the deduction for patronage dividends claimed by petitioner for 1939. The issue, as presented, is equivalent to a request that we increase the deduction for patronage dividends by $3,485.93 over the amount allowed by respondent. In Co-Operative Oil Ass'n. Inc. v. Commissioner, 115 Fed. (2d) 666, the Circuit Court of Appeals for the Ninth Circuit considered and denied a similar request except that the taxpayer there had earned

but had not distributed the "patronage dividends" to its members. We think the fact that the patronage dividends here were subsequently distributed is insufficient to distinguish this proceeding from the rule laid down by the Ninth Circuit as follows:

> Petitioner makes no attempt to show that it is the object of legislative grace by pointing to a statute authorizing the deduction. The Congress has not legislated the deduction, and the courts can not usurp that function. Whether respondent /Commissioner of Internal Revenue/ should have allowed the deduction he did not allow is a question upon which we express no opinion.

In view of this authority it is immaterial how respondent determined the deduction he would allow for patronage dividends. It is sufficient for present purposes that we can find no statutory authority for increasing the deduction that respondent has allowed. /Underscoring added in last paragraph./

The Company then carried the case to the Circuit Court of Appeals for the Ninth Circuit, which in 132 F. 2d 706 affirmed the decision of the United States Tax Court in upholding the action of the Commissioner of Internal Revenue. Apparently it was urged on appeal that the Company had not declared a dividend, and it seems to have been argued that this strengthened the claim of the Company for the right to deduct amounts disbursed on account of the preferred stock. In this connection the court said:

> The record does not show that a dividend was declared, and if, as petitioner contends, the money paid these stockholders by the petitioner was not a dividend, they were not entitled to it. In the latter case, if anything at all, petitioner has no more than a chose in action for money paid by mistake. The statute does not provide a deduction for such choses in action. Nor has it for dividends on preferred stock. Art. 23(b)-1 of Treasury Regulations 101; Pacific Southwest R. Co. v. Commissioner, 9 Cir., 128 F.2d 815, 817; Elko-Lamoille Power Co. v. Commissioner, 9 Cir., 50 F.2d 595, 596; Brown-Rogers-Dixson Co. v. Commissioner, 4 Cir., 122 F.2d 347, 350, and cases cited.

In regard to the refusal of the Commissioner of Internal Revenue and the United States Tax Court to allow the Company to deduct the $3,485.93

in addition to patronage dividends in the amount of $11,374.37 which were allowed to be deducted, the court said:

> As to $3,485.93 allocated by petitioner under accrual accounting to the tax year 1939, the Commissioner disallowed a deduction because no such provision for prior obligations had been made.

It was also urged, at least before the Circuit Court of Appeals, that the $3,485.93 which had been paid out as patronage dividends, was deductible as an ordinary and necessary expense of carrying on the trade or business of the Company, and it was argued that, under the statute of Montana under which the Company was organized, such disbursements are ordinary expenses. In refusing to accept this argument the court said:

> The business of the petitioner differs from that of an Idaho corporation considered by us, where the sales were made solely to the members of the corporation and were treated as a kind of dividend to its corporate members for which the income tax act and regulations allowed no deduction. Cooperative Oil Ass'n. Inc. v. Commissioner, 9 Cir., 115 F.2d 666. In the instant case the business is conducted with the general public and the so-called dividends are rebates which come to all purchasers, qua purchasers, and not because of membership or stockholding interest.
>
> We are not required here to consider whether such patronage dividends in a proper case are such business deductions, for they were not paid in pursuance of the Montana Code but in violation of its sole provision for their payment. That sole provision is (Sec. 6387, Revised Codes of Montana, 1935, c. 38), "The directors of a co-operative association, subject to revision by the stockholders at a general or special meeting may apportion the earnings of the association by first paying dividends on the paid up capital stock, not exceeding six per cent. (6%) per annum on the par value thereof, from the remaining funds, if any, accessible for dividend purposes, not less than five per cent. (5%) of the net profits for a reserve fund until an amount has accumulated in said reserve fund amounting to thirty per cent. (30%) of the paid up capital stock, and from the balance, if any, five per cent. (5%) for educational fund to be used for teaching co-operation, and the remaining of said profits, if any, by uniform dividends upon the amount of purchases of patrons and upon the wages and for

> salaries of employees, the amount of such uniform dividends on the amount of their purchases, which may be credited to the account of such patrons on account of capital stock of the associations; but in production associations such as creameries, canneries, elevators, factories, and the like, dividends shall be on raw material delivered instead of on goods purchased. In case the association is both a selling and a productive concern, the dividends may be on both raw material delivered and on goods purchased by patrons." [Emphasis supplied by the court.]

In other words, in view of the fact that the Company had not handled its earnings in accordance with the law of Montana applicable thereto, the court declined to consider whether the patronage dividends of $3,485.93 could be regarded as ordinary expenses of the Company under the law of Montana. This emphasizes the importance of cooperative associations strictly following the statutes under which they are incorporated. At least in cases tried in Federal courts, the fact that an association is acting ultra vires may adversely affect its rights. A cooperative livestock association transacted business with nonmembers in violation of its charter and the Supreme Court of the United States held that the association could not successfully complain of a boycott by dealers in livestock, insofar as the nonmember business was concerned (United States v. American Livestock Commission Company, 279 U.S. 435, 49 S. Ct. 425, 73 L. Ed. 787).

The Company in the instant case further urged that in any event the $3,485.93 had been paid to its patrons through mistake, and that as mistakes are usual and customary incidents of business, that the Company should be allowed to deduct the amount in computing its income taxes, but the court said:

> However, assuming such a transaction warrants a deduction, the erroneous payments were not made in the tax year 1939 and were not deductible from the income of that year.

There is no statutory authority in computing income taxes for the deduction of patronage dividends as such. If the Bureau of Internal Revenue declines to permit an association to deduct such dividends in computing its income taxes as was done, in part, in the instant case, it is believed that an association has no basis for successfully appealing from such a ruling. Because "'Whether and to what extent deductions shall be allowed depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed' and 'a taxpayer seeking a deduction must be able to point to

an applicable statute and show that he comes within its terms.'" (Cooperative Oil Association v. Commissioner of Internal Revenue, 115 F. 2d 666, Summary No. 9, page 5, and Summary No. 17, page 15; see also New Colonial Ice Co. v. Helvering, 292 U.S. 435, 440, 54 S. Ct. 788, 790, 78 L. Ed. 1348; White v. United States, 305 U.S. 281, 292, 59 S. Ct. 179, 83 L. Ed. 172.)

In other words, unless the statute authorizes the making of a deduction in computing income taxes, it may not be made as a matter of right. Of course, if an association has entered into a positive and unequivocal obligation in advance with its patrons to return to them all amounts which they pay to the association over and above its operating costs and expenses, amounts so returned would be deductible because they are debts. The prior obligation would operate to keep the money in question from having the status of income and obviously income taxes may only be required to be paid on income. If the amounts returned are paid as debts there is no occasion for the declaration of a patronage dividend any more than there would be need in the normal case for specific action by the board of directors in the paying of a note due at the bank. Indeed, if a dividend must be declared by the board of directors before a disbursement may be made, this would appear to show that earnings are being distributed and not that debts are being paid.

Dairy Cooperative Association Lawful Under Section 6 of Clayton Act

In 1942 the Dairy Cooperative Association of Portland, Oregon, its directors, officers, and two employees, were indicted in the District Court of the United States for the District of Oregon (Indictment No. C-16086), for an alleged violation of the Sherman Anti-Trust Act. The character of the charges is illustrated by paragraph 16 of the Indictment which reads as follows:

> Beginning in the year 1931 or 1932, the exact date to the Grand Jurors unknown, the defendants named herein, and other persons to the Grand Jurors unknown, have combined and conspired together to monopolize and control the production and distribution of milk in the Portland area, in violation of Section 2 of the Act of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," that is to say, defendants have combined and conspired together to do the following things, to-wit: monopolize and control the production of milk in the Portland area, including milk produced in the State of Washington and within the Portland area for sale to purchasers located in the State of Oregon, and including also milk produced in the State of Oregon and within the Portland area for sale to purchasers located in the State of Washington; and monopolize and control the distribution of milk within the Portland area, including the distribution of milk produced in the State of Washington for distribution in Oregon, as aforesaid.

In due course the case came on for trial and after hearing evidence all of the defendants were found not guilty. In this connection the court rendered the following opinion, which it is understood will be reported:

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	No. 16086
DAIRY COOPERATIVE ASSOCIATION, et al,	)	MEMORANDUM OPINION
Defendants.	)	

An older generation of judges interpreted the Clayton act to defeat the plain intent of the law, and, almost

perversely, it seemed, sought to impose their economic views on the American scene in the controversial field of capital and labor. The result was the enactment of the Norris-LaGuardia act, which took away the power of federal courts to issue injunctions in labor disputes, except in cases of fraud or violence; and it might be said that the Wagner act, which created the National Labor Relations Board, was also the product of the early judges' hostility to the liberalizing provisions of the Clayton act.[1]

Extremes beget extremes. As stated, the whole course of recent labor legislation seems to have been determined by the unwillingness of some judges to accept and interpret with good will the progressive labor legislation of an earlier period. The amazing statement made this day by a national labor leader that he claims the right to call out 500,000 workers in the vital wartime shipbuilding industry for reasons purely personal to himself and his organization may be considered an end result of this reactionary judicial period. The nation is paying a severe penalty in this time of its greatest peril for reactionary judicial thought and decision of twenty or more years ago.

Now I am asked to "interpret" the other provisions of the Clayton act which say generally that a farmers' cooperative association shall not be subject to the Anti-Trust laws. I am asked to hold that under certain circumstances, even when acting solely in its self-interest, and not in concert with others, a farmers' cooperative can be punished as a monoply. I am asked to hold that in this case, which I am told is the first case brought by the Anti-Trust Division of the Department of Justice against a farmers' cooperative acting alone and not in concert with others, the defendant is attempting to create a monoply and is punishable criminally. In short, I am asked to scuttle the plain language of the Clayton act as to cooperatives, as anti-labor courts scuttled the labor provisions of the same act, with the serious consequences that endure to this hour.

It may be that the acts of the defendant cooperative in this case, tested without regard to the provisions of the Clayton act, are monopolistic in character. I have not given serious thought to that question, for it seems to me when Congress said that cooperatives were not to be punished, even though they became monopolistic, it would be as ill-considered[2] for me to hold to the contrary as were some of the early labor decisions, more ill-considered in fact, in view of the serious consequences to the American people, now known to have followed from those decisions in the labor field.

For these reasons, a finding of not guilty will be made.

Dated this 28th day of January, 1943

CLAUDE McCULLOCH
JUDGE

The Clayton act:

1. "........Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, ..., or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." 15 USCA Sec. 17, page 276.

2. Compare United States of America ex rel. Marcus v. Hess et al _____ U.S. _____ (decided January 18, 1943).

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G. H. Marsh, Clerk
by A. F. Joy, Deputy

Attention is called to the fact that the court found the defendants, because of the provisions of Section 6 of the Clayton Act, not guilty of operating in restraint of trade. The Capper-Volstead Act was not referred to by the court. Of course, Section 6 of the Clayton Act is applicable only to nonstock cooperatives, while the Capper-Volstead Act is applicable alike to stock and nonstock associations that meet

its conditions. Presumably the conclusion of the court was based largely on the language of Section 6 of the Clayton Act, reading as follows:

> nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

The language just quoted on its face forbids holding an organization that meets the conditions of Section 6, or the members thereof, an illegal combination or conspiracy in restraint of trade. Apparently the Judge proceeded on the theory that in holding the defendants not guilty of restraining trade that he was simply carrying out the terms of the statute.

In this connection it should be kept in mind that nothing in Section 6 of the Clayton Act sanctions an association entering into a conspiracy or a combination with third persons, nor does it sanction the making of contracts with third persons that would be illegal if entered into by noncooperative organizations. In the instant case, however, no third persons were involved, nor had the association apparently entered into any contracts of an illegal or abnormal character. Likewise, the Capper-Volstead Act has no application to a situation in which an association meeting its conditions has entered into a conspiracy or combination with third persons. It is believed that this was definitely established in the case of United States v. Borden Company, 308 U.S. 188, 60 S. Ct. 182, 84 L. Ed. 181, reversing 28 F. Supp. 177 (see Summary No. 5, page 1). In other words, when an association has conspired or entered into a combination with third persons, it is as amenable to prosecution for a violation of the Federal antitrust laws as is any other person or organization. It is only when an association has acted alone and in a normal manner that it may successfully defend a Federal antitrust proceeding by reason of Section 6 of the Clayton Act or the Capper-Volstead Act, as the case may be.

It is interesting to note that the Judge who decided the case under discussion was the Judge who decided the case of Columbia River Packers Association v. Hinton, 34 F. Supp. 970, reversed on ground labor dispute involved 117 F. 2d 310 reversed on ground -- no labor dispute involved, 315 U.S. 143, 62 S. Ct. 520, 86 L. Ed. 441 (see Summary No. 14, page 1). In that case it was held that a statute relative to fishermen similar in language and purpose to the Capper-Volstead Act did not authorize an association of fishermen to enter into a contract with a buyer of fish barring the buyer of fish from

acquiring fish from anyone who was not a member of the association and which contract did not obligate the association or its members to furnish the fish required by a buyer. The court apparently was of the opinion that the contract was one which could not lawfully have been made by any person or concern under comparable circumstances and of course it differed widely from a type of contract under which a seller agrees to furnish a buyer with all of a given commodity that the buyer might need in his business.

The case involving the Columbia River Packers Association was followed in Manaka v. Monterey Sardine Industries, 41 F. Supp. 531, in which the plaintiff was successful in establishing that he was entitled to recover triple damages under the Sherman Anti-Trust Act from the defendant, a cooperative association of owners of boats who fish in the vicinity of Monterey Bay, California, because the defendant had entered into contracts with packers of fish which prevented the plaintiff from marketing fish which he took, although under these contracts the defendant did not obligate itself or its members to furnish a packer with all of the fish needed by him. The court held that the statute relative to fishermen comparable with the Capper-Volstead Act did not constitute a defense to this suit and this conclusion was presumably based upon the theory that the contracts of the Monterey Sardine Industries, Inc., were of such an abnormal character that no one under like conditions could lawfully enter into them. The court significantly remarked that "the associations authorized to do business as marketing agencies of aquatic products (15 U.S.C.A. 522) are not in themselves illegal combinations ***" but obviously the legality of an organization is a thing apart from what an organization may do or the contracts that it may legally enter into.

Mortgagee, by Consenting to Sale, Lost Lien

In the case of East Central Fruit Growers Production Credit Association v. Zuritsky, decided by the Supreme Court of Pennsylvania, 30 A. 2d 133, it appeared that the Credit Association had made loans to a corporation, Rose Valley Fruit Farms, Inc., engaged in farming, and that these loans were secured by a chattel mortgage on crops, including fruit crops, to be produced by the mortgagor. After the filing for record of the chattel mortgage, the mortgagor made various shipments of apples to the defendant to be sold by him as a commission broker. The defendant, after selling the apples, deducted the usual commissions payable in such circumstances, and remitted the proceeds to Rose Valley Fruit Farms, Inc. That corporation defaulted in its payments on loans it had obtained from the Credit Association, and thereafter the Credit Association unsuccessfully brought suit against the defendant for an accounting for the apples which the defendant had sold which were covered by the chattel mortgage, and the proceeds from which had been paid to the mortgagor by the defendant without actual knowledge of the chattel mortgage. On appeal, the court stated that the first question for consideration was whether the defendant commission broker was within the terms of the chattel mortgage statute of Pennsylvania. Section 1 of that statute provides that -

> Such mortgage shall be a lien against the chattels and crops thereby conveyed, and shall be good and available in law against any subsequent purchasers or execution creditors upon the recording thereof * * * .

The trial court held that "by specifying subsequent purchasers and execution creditors the legislature intended to exclude all others; that, accordingly, the commission broker was not within its terms".

In order to avoid the conclusion that the commission broker was neither a purchaser nor an execution creditor as those words were used in the statute, the Credit Association urged that "a broker, making a sale on behalf of and accounting to the chattel mortgagor, acts as the mortgagor's agent, and thereby becomes liable to the mortgagee." The appellate court stated that this theory was not applicable in the instant case because the Credit Association, with respect to the sales made by the defendant, "'tacitly agreed and consented thereto ***' and not only made no objection but, as the crop was perishable, desired the apples sold." Under the circumstances the court held, inasmuch as the proceeds derived from the sale of the apples had been paid by the defendant to Rose Valley Fruit Farms, Inc., without actual knowledge of the chattel mortgage, and as the sales of the apples had

been made with the implied consent of the Credit Association, that the defendant was not liable in any amount to the Credit Association.

Generally speaking, the lien of a chattel mortgage on a crop is not lost because the crop has been sold without the express or implied consent of the mortgagee. If a mortgagor sells a crop without the consent of the mortgagee, the mortgagee usually may continue to assert his lien against the crop or may maintain an action in conversion against anyone who wrongfully asserts a right to the property mortgaged contrary to the rights of the mortgagee (Rolette State Bank v. Minnekota Elevator Co., (N.D.) 195 N.W. 6).

It has been held that the holder of a chattel mortgage is not required to consent to the sale of the property covered thereby and that the mortgagee is not liable in damages for any loss that is suffered by the mortgagor because of the refusal of the mortgagee to consent to a sale (Colorado National Bank of Denver v. Meadow Creek Livestock Company, 36 Idaho 409, 211 P. 1076; but see Gulfport Fertilizer Co. v. Jones, 15 Ala. App. 280, 73 So. 145).

If a mortgagee unconditionally consents to a sale by the mortgagor, the lien is lost, and this, of course, means that the buyer takes the chattels free of the lien (Shortridge v. Sturdivant (N.D.) 155 N.W. 20).

What is the situation where the mortgagee authorizes the mortgagor to sell the property covered by the chattel mortgage as his agent, provided that the proceeds arising from the sale are applied on the indebtedness covered by the mortgage? In this connection the following quotation from the opinion in the case of Babbitt Bros. Trading Co. v. Marley (Ariz.) 238 P. 392, 394, should be of interest:

> When a mortgagor sells mortgaged property with the consent of the mortgagee and, to the knowledge of the purchaser, agrees with mortgagee he will apply the proceeds on the debt, or do some other thing, does the lien continue unless the purchaser sees to it that the purchase price is applied in accordance with the agreement or the thing done?
>
> We have examined the authorities cited by counsel on this point and are of the opinion that, where the purchaser is a party to the agreement or the condition is a condition precedent, he only takes a clear title when such agreement is carried out. Brimm v. Long, 22 Kan. 153; Fields v. Jobson Wagon Co. et al., 109 Mo. App. 84, 81 S.W. 636;

> Dodson v. Dedman, 61 Mo. App. 209; Eagle Drug Co. v. White (Tex. Civ. App.) 182 S.W. 378; First Nat. Bank of Tulsa v. Hoover (Tex. Civ. App.) 244 S.W. 1044. But where the purchaser is not a party to the agreement, and the condition is a condition subsequent, he takes a good title without the duty of seeing to the application of the proceeds, or the execution of the agreement. Woodward v. Jewell, 140 U.S. 247, 11 S. Ct. 784, 35 L. Ed. 478; Rusk Lumber Co. v. Meyer (Tex. Civ. App.) 126 S.W. 317; Abbeville Live Stock Co. v. Walden, 209 Ala. 315, 96 So. 237; Lumberman's Nat. Bank v. Bush, etc. (Tex. Civ. App.) 247 S.W. 295; National City Bank v. Adams, 30 Ga. App. 219 117 S.E. 285; New England Mortgage Security Co. v. Great Western Elevator Co., 6 N.D. 407, 71 N.W. 130. [Underscoring added.]

In Western Seed Marketing Co. v. Pfost (Idaho) 262 P. 514, 515, it is said:

> In the face of the recorded mortgage, it was incumbent on the purchaser to prove that the consent to the sale was actually given, and that it was an unconditional one. This court has held that where a mortgagee consents to a sale of the mortgaged chattels by the mortgagor, he waives the lien of his mortgage, and the purchaser takes title free of the mortgage lien. Knollin v. Jones, 7 Idaho, 466, 63 P. 638; Bellevue State Bank v. Hailey National Bank, 37 Idaho, 121, 215 P. 126. This is a general rule universally upheld, and necessary for the protection of purchasers of mortgaged chattels who have relied upon such consent. However, it is likewise a well-recognized rule that a sale of mortgaged chattels will not be valid as against the mortgagee when the consent of the mortgagee is qualified and upon a condition which the purchaser has promised but failed to perform. Dodson v. Dedman, 61 Mo. App.209; Oswald v. Hayes, 42 Iowa, 104; Bailey v. Costello, 94 Wis. 87, 68 N.W. 663; Monson v. Renaker (Ky.) 60 S.W. 924; Trabue v. Wade & Miller (Tex. Civ. App.) 95 S.W. 616. [Underscoring added.]

In many jurisdictions if a mortgagee gives the mortgagor authority to sell property covered by a chattel mortgage, and the right to apply the proceeds to his own use, or to such use as he sees fit, the chattel mortgage is void as to creditors and subsequent purchasers in good faith without reference to the bona fides of the mortgage debt or the honesty or intention of the parties. In the case of

Ross v. State Bank, 198 Wis. 335, 224 N.W. 114, 73 A.L.R. 225, the court approvingly quoted the following:

> A mortgage which permits the mortgagor to remain in possession of the mortgaged property, and to sell it and apply the proceeds, partially or wholly, to his private use, is void as to creditors.

See also 11 C.J. 571 and Turk v. Kramer, 138 Okla. 35, 280 P. 266, 73 A.L.R. 229. Following the opinion in this case in 73 A.L.R. beginning on page 336 will be found a comprehensive note covering this subject.

The following is taken from the opinion in the case of Moffett Bros. & Andrews Commission Co. v. Kent (Mo.) 5 S.W. 2d 395:

> If a mortgagee gives his consent for the mortgagor, who under the terms of the mortgage is permitted to retain the custody, control, care, and management of the mortgaged property, to sell such property, he thereby waives his lien on the property, even though the consent was given upon the express or implied condition that the mortgagor should apply, or deliver to the mortgagee to be applied, the proceeds of the sale on the mortgage debt. A consenting by the mortgagee to a sale of the property by the mortgagor and the passing of the title and a retention by him of the mortgage lien are wholly inconsistent positions. The mortgagee cannot in effect make the mortgagor his agent to sell the property and then when a sale is affected through such agency retain his lien notwithstanding. By consenting to a sale and the collection of the proceeds by the mortgagor, the mortgagee surrenders his lien and looks to the mortgagor personally for the payment of the mortgage debt. It is so held quite universally. Stockyards National Bank v. Wool Co. (Mo. Sup.) 289 S.W. 623, and authorities cited. It is not necessary that such consent in order to constitute a waiver be expressed; it may be implied. Nor is it necessary that the vendee of the mortgagor have knowledge of such consent, or even of the existence of the mortgage. Stockyards National Bank v. Wool Co., supra; National Bank of Commerce v. Morris, 125 Mo. 343, 28 S.W. 602; Coffman v. Walton, 50 Mo. App. 404. [Underscoring added in last sentence.]

Where a mortgagor acts as agent of the mortgagee in the sale of property covered by a chattel mortgage, with the understanding that the proceeds of the sale when received by the mortgagor will be applied on the indebtedness covered by the chattel mortgage, it has been held that

such proceeds are not subject to attachment by other creditors of the mortgagor. In the case of Middleton Lumber and Fuel Co. v. Kosanke (Wis.) 256 N.W. 633, it appeared that the mortgagor of a crop of peas delivered them to a canning company with the consent of the mortgagee and pursuant to an understanding that the sale and delivery of the peas to the canning company was made by the mortgagor as the agent of the mortgagee and that the proceeds derived from the sale of the peas were to be delivered to the mortgagee for application on the mortgage debt. In the light of these facts the court said:

> The sale and delivery of the crop under those circumstances did not result in the substitution of the mortgagor's personal promise for the mortgage security, or the waiver of the mortgage lien on the mortgaged property and the proceeds thereof. On the contrary, under those circumstances, the chattel mortgage upon the crop under contract of sale operated as an equitable assignment of the proceeds of the sale and, when the crop was delivered pursuant to the contract, the title to the proceeds to the extent of the amount secured by mortgage was in the mortgagee. Consequently those proceeds were not subject to garnishment by the mortgagor's creditors. Black Hawk State Bank v. Accola, 194 Wis. 29, 215 N.W. 433; Caroline State Bank v. Andrews, 204 Wis. 393, 235 N.W. 794; Carpenter v. Forbes, 211 Wis. 648, 247 N.W. 857; Clatworthy v. Ferguson, 72 Colo. 259, 210 P. 693; Liddle v. Hernandez, 72 Colo. 585, 212 P. 821; Brug v. Herbst, 78 Colo. 128, 239 P. 868; Lathrop v. Schlauger, 113 Neb. 14, 201 N.W. 654.

See also Thex v. Shreve (Wyo.) 267 P. 92; Myers v. Bushmiaer (Ark.) 145 S.W. 722; Cole-McIntyre-Norfleet Co. v. Du Bard (Miss.) 99 So. 474; Crosby v. Fresno Fruit Growers' Co. (Cal. Civ. App.) 158 P. 1070; Kramer v. Burlage (Wis.) 291 N.W. 766.

Dissolution of Cooperative Failed

The case of Farmers' Union Co-operative Brokerage v. Palisade Farmers Union (S.D.) 7 N.W. 2d 293, involved the validity of voluntary dissolution proceedings instituted by the Farmers' Union Co-operative Brokerage. It appeared that an application was filed for the dissolution of that corporation in the Circuit Court of Minnehaha County, South Dakota. Objections thereto were interposed by three stockholders who alleged among other things that no legal meeting of the stockholders was held and that no resolution "for the voluntary dissolution of the corporation was adopted by affirmative vote of not less than two-thirds vote of the outstanding stock of said corporation." That court

> . . . found that no actual fraud was practiced, attempted or intended by the directors in trying to secure the dissolution of said corporation but that "their action in directing the manager to sell the stock in trade of the corporation in bulk and quit business before a vote was had by the stockholders on a dissolution of the company and shortly after the stockholders had at a meeting refused to sanction a movement to sell the assets of the company in bulk, was irregular." The trial court refused to appoint all of the directors of the corporation as statutory trustees to wind up the affairs of the corporation but appointed two of such directors and a disinterested third person to act as such trustees.

On appeal, the court pointed out that the procedure for the voluntary dissolution of a corporation is statutory, and that the requirements specified by the statute must be met in order to give the court jurisdiction. In this connection the court quoted from an earlier decision:

> In order to confer jurisdiction upon the court to order dissolution it must be shown that at a legal meeting the stockholders had voted by a vote of two-thirds to voluntarily dissolve such corporation.

The Farmers' Union Co-operative Brokerage asserted

> . . . that at the time of the holding of the special meeting of the stockholders for the purpose of passing upon the question of voluntary dissolution, to-wit on February 17, 1942, the corporation had 259 qualified, voting members and that at such meeting 183 votes were cast in favor of such dissolution and 42 voted against. The respondents contend that 43 stockholders were not

counted or included by appellant, in determining the number of stockholders and that no notice of such meeting was sent to such 43 stockholders and that none of them was present or voted at such meeting. Appellant on the other hand contends that these 43 alleged stockholders had ceased to be such, or at least were not entitled to vote at said meeting, by reason of their failure to pay their dues or assessments which became due on September 15, 1941, to the Farmers Educational and Co-operative Union. It thus becomes necessary for us to determine the status of these alleged stockholders.

The Farmers Educational and Co-operative Union of America, more commonly known as "The Farmers Union", is a non-stock corporation, a portion of whose by-laws we shall hereafter have occasion to discuss. The Farmers Union Co-operative Brokerage is a stock company entirely separate and distinct from the Farmers Union. Each corporation is a legal entity having a separate constitution, by-laws and officers. The constitution and by-laws of the Farmers Union Co-operative Brokerage provide among other things that each voting stockholder shall prior to the issuance of his stock certificate cause the following agreement to be filed by the secretary: "We do hereby agree to the provisions of the Constitution and By-Laws of the Farmers Union Co-operative Brokerage and agree further that should we cease to be members of the Farmers' Educational and Co-operative Union of America, we will, upon demand by the Board of Directors, surrender our certificate of stock to said board to be listed for sale and paid for as provided in the By-Laws." The constitution and by-laws also contain the following provision: "The following named organizations may become stockholders of Class A voting stock: A. The S. D. Division of the F. E. C. U. of America, B. Any county or local union of a recognized division of the F. E. C. U. of America, C. Any co-operative business association organized and conducted by members of any recognized division of the F. E. C. U. of America." The constitution and by-laws further provide that the powers and interest of all stockholders shall be equal regardless of the amount of capital stock they may hold, with the exception that voting rights shall be limited to holders of Class A stock only, and further provides that: "At every election or meeting held pursuant to this constitution and by-laws, each Class A stockholder

shall be entitled to one vote and no more." Section 7 of Article II of such constitution and by-laws is as follows: "Should any stockholder desire to surrender their stock or for any reason forfeit their right to hold such stock they shall register such stock with the secretary of this association, the same to be sold in the order of its registration and the selling price shall be paid to the owner of record at the time such sale is made. If a Local or county Union holding stock in this association forfeits its charter or otherwise becomes defunct, the stock held by such Local shall revert to and become the property of this association."

Aside from the matters hereinbefore set forth the constitution and by-laws contain no voting restrictions.

The 43 stockholders, 40 of which were Local unions and 3 of which were county unions, were the holders of fully paid, outstanding Class A stock registered on the books of the corporation as stockholders, and none of such stock had been called in, nor surrendered upon demand by the board of directors or otherwise. It does not appear that any of the 40 Locals or 3 county unions had forfeited its charter, and it thus becomes necessary to determine whether such locals or county unions had "otherwise become defunct" as provided in Section 7 of Article II above quoted.

The court went on to point out that "the right to representation at the annual state convention of the association" was dependent "upon payment of dues for the current year", but at least by implication stated that this did not operate to deprive a stockholder of the right to vote on the question of dissolution. In this connection the court referred to Section 1 of Article V of the bylaws which provided that "Any local delinquent for three years shall be considered as dead and subject to reorganization or suspension of charter." The court stated that "defunct" and "dead" as used in the bylaws were to be considered as synonymous terms, and that the 43 stockholders in question were not defunct "but were still the owners and holders of this stock at the time of the holding of the special meeting", although they may not at that time have been entitled to representation at the annual meeting of the Farmers' Union. The court therefore held that the resolution of dissolution had not been adopted by a two-thirds vote of the stockholders and that the trial court was without jurisdiction to grant the application of dissolution.

In response to the contention that the 43 stockholders were not objecting to the granting of the application for dissolution, the court said:

> . . . the adoption of the resolution in the manner prescribed by law must affirmatively appear in order to give the court jurisdiction; the burden was upon the corporation to establish this fact, and this would have been true even had there been no objection to the granting of the application.

The court indicated that if the judgment of dissolution had been otherwise regular, all of the directors of the association should have been appointed as trustees.

This case emphasizes the fact that while there may be restrictions on the rights of stockholders if they have failed to pay dues or meet assessments or other specified conditions, these restrictions are not to be extended beyond their terms.

Warehouse Licensed Under Federal Warehouse Act Free From Regulation Under State Warehouse Act

The case of In Re Farmers Cooperative Association, decided by the Supreme Court of South Dakota, 8 N.W. 2d 557, presented the question of whether a cooperative association, in the operation by it of a public grain warehouse, was free from regulation by the State of South Dakota concerning such grain warehousing, by reason of the fact that the association was licensed under the United States Warehouse Act (7 U.S.C. § 241, et seq.), to engage in that business. In holding that the association was not amenable to the warehousing requirements and regulations of the State of South Dakota under the circumstances involved, the Superme Court of that State said in part:

> Prior to 1935 the Cooperative was licensed under the state act. During that year it made application for and was granted a license under the federal act, and has since failed and refused to comply with the state act. After investigation, upon notice and hearing, the Commission /Public Utilities Commission of South Dakota/ found that "the Farmers Cooperative Association, a corporation at Dallas, South Dakota, and its officers and directors, are not now and never have been engaged in the storage of grain for or in the course of interstate and foreign commerce, and that said corporation, its officers and directors, are operating in violation of state law in that it and they have not procured a license from the Public Utilities Commission of this state to operate as grain warehouseman, * * *" and entered its order requiring such corporation, its officers, directors and employees to cease and desist from further operations as grain storage warehousemen. On appeal to the circuit court, the order was reversed, and the Commission has brought the record here for review.
>
> The facts are not in dispute. During the period investigated, viz., July 26, 1939 to April 20, 1940, the corporation received in storage only 62,256 bushels of wheat under 242 storage receipts or contracts. Of this volume 205 bushels were redelivered to owners, 8,000 bushels remained in storage, and the balance had been purchased by the Cooperative, the receipts cancelled. The grain so purchased by the Cooperative was thereafter shipped out of the state to terminal markets in other states. All of this wheat delivered for storage was produced

within the state and was receipted for by federal receipts reading in part as follows:

"Received from _____ of _____ pounds of grain of the amount, kind and grade described herein, for storage in course of interstate or foreign commerce in the above-named warehouse for which this receipt is issued subject to the United States Warehouse Act, the regulations for grain warehouses thereunder, and the terms of this contract.

"Said grain is fully insured by the undersigned warehouseman against loss or damage by fire, lightning, and tornado, unless expressly stated otherwise on the face of this receipt. Said grain is accepted for storage upon condition that the holder of the receipt or depositor of grain shall demand the delivery of the grain not later than one year from the date of this receipt. The undersigned warehouseman is not the owner of the grain covered by this receipt, either solely, jointly, or in common with others, unless otherwise stated hereon. Upon the return of this receipt, properly endorsed, and the payment of all charges and liabilities due the undersigned warehouseman, as stated herein, said grain or grain of same or better grade will be delivered to the above-named depositor or his order."

As wheat was stored the intention of the owner was not discussed. Occasionally when questions were asked the Cooperative explained that they were licensed under the United States Warehouse Act. Subsequent to January, 1940, the Cooperative posted a notice in its place of business reading in part as follows: "only grain in the course of interstate and foreign commerce will be accepted for storage here."

The central issue is two-fold. Does warehousing as conducted by the Cooperative fall within the reach of the power granted to Congress by the commerce clause of the Constitution? Article 1, § 8, clause 3. If so, did Congress intend to exert that power when it enacted the United States Warehouse Act?

The broad controlling principles upon which our decision must rest have been settled by the Supreme Court of the United States. The power of Congress to regulate commerce with foreign nations and among the several states

"is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." Gibbons v. Ogden, 9 Wheat. 1, 196, 6 L.Ed. 23. "The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." United States v. Darby, 312 U.S. 100, 61 S.Ct. 451, 459, 85 L.Ed. 609,, 132 A.L.R. 1430. "Whether the subject of the regulation in question was 'production,' 'consumption,' or 'marketing' is, * * * not material for purposes of deciding the question of federal power * * *. That an activity is of local character may help in a doubtful case to determine whether Congress intended to reach it. The same consideration might help in determining whether in the absence of Congressional action it would be permissible for the state to exert its power on the subject matter, even though in so doing it to some degree affected interstate commerce. But even if * * * activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'" Wickard et al. v. Filburn, 63 S.Ct. 82, 89, 87 L.Ed. ____. The power to regulate interstate commerce includes the power to foster, protect and stimulate commerce. United States v. Lowden, 308 U.S. 225, 60 S. Ct. 248, 84 L.Ed. 208; Wickard et al. v. Filburn, supra. It is of the essence of this power of congress that where it exists it dominates. Houston, E. & W. T. R. Co. v. United States, 234 U.S. 342, 34 S. Ct. 833, 58 L.Ed. 1341. There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of Federal power. The Minnesota Rate Cases, (Simpson v. Shepard) 230 U.S. 352, 33 S.Ct. 729, 57 L.Ed. 1511, 48 L.R.A., N.S., 1151, Ann. Cas. 1916A, 18. Wherever conflict exists, the state legislation must fall. Gibbons v.

Ogden, supra; Kelly v. Washington, 302 U.S. 1, 58 S. Ct. 87, 82 L.Ed. 3.

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We hold that the warehouse business of the Cooperative is local in character and not a part of interstate commerce.

Thus we are brought to the pivotal question. Does the warehousing business of the Cooperative so affect interstate commerce as to fall within the reach of federal power? The authoritative declarations of the Supreme Court of the United States indicate that an affirmative answer must be made if it appears, from a study of the course of national commerce in wheat, that the aggregate business of all like local elevators exercises a substantial economic influence or effect on interstate commerce.

It was on such an economic basis that the Supreme Court lately justified federal regulation of the domestic consumption by an Ohio farmer of wheat raised on his small farm and never intended in any part for interstate commerce. In writing of the relation of his meager consumption to the national demand and supply, it said "That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial." Wickard et al. v. Filburn, supra. Our conclusion that we must look to the impact on the national economy of the country elevator business as a whole in determining whether its effect on interstate commerce is substantial in degree is predicated on that holding. In fact, if its length did not forbid, we would reproduce the second part of that opinion because it reveals the court's authoritative interpretation of the whole course of its decisions expounding the commerce clause and places a new and strengthened emphasis upon the "embracing and penetrating nature" of the power of Congress thereunder, not merely to "prescribe the rule by which interstate commerce is governed" but to take control of all intrastate activities capable of producing harmful or beneficial national economic repercussions. The fact that there are many who respectfully question the rationale of this interpretation is inapposite to our analysis of the issue before us. It is our function to apply the law as it has been authoritatively declared.

* * * * * * * * * * * * *

Reason impels the conclusion that the Congress intended to authorize the Secretary of Agriculture to regulate warehouse businesses of the kind described. The aim of the enactment was to secure fair and uniform business practices, Federal Compress & W. Co. v. McLean, 291 U.S. 17, 54 S.Ct. 267, 78 L.Ed. 622, and to facilitate and safeguard the commerce in agricultural products. The dominant words employed are "stored for interstate * * * commerce". United States v. Hastings, 296 U.S. 188, 56 S.Ct. 218, 221, 80 L.Ed. 148. In common usage the preposition "for" indicates that "in consideration of which, in view of which, or with reference to which anything is done." Webster's New International Dictionary. By the use of that word, rather than the phrase "in the course of", Congress has supplied a clear and unmistakable indication of an intention to encompass more than that which forms a part of interstate commerce. It logically follows that it must have intended to include storage which affects interstate commerce. That the Supreme Court of the United States is of this view seems to be implicitly revealed by its opinion in Federal Compress & W. Co. v. McLean, supra, which dealt with warehousing of cotton within the state of its origin but intended for interstate commerce. That the Congress did not intend the Act to apply to warehouses "operating under state laws and serving local demands in intrastate transactions; receiving for storage and issuing receipts for agricultural products in connection with enterprises and trade that are entirely local", is indicated by United States v. Hastings, supra. But here all but a negligible part of the grain stored during the period investigated moved in interstate commerce and we judicially know that the great bulk of our wheat is intended for that commerce when produced. As we have indicated, according to the course of business, wheat is amassed at these depots of supply for the very purpose of feeding the stream of commerce. There grain is in fact stored "for interstate commerce" and we hold such plants to fall within the purview of the act. [Underscoring added.]

Suits for Treble Damages Under the Sherman Anti-Trust Act

In the case of Louisiana Farmers' Protective Union, Inc. v. Great A. & P. Tea Co., Inc., et al., 40 F. Supp. 897 (Summary No. 15, page 6, 10), the complaint was dismissed without leave to amend because the court apparently believed that the loss alleged to have been suffered by the growers could not, with any degree of certainty, be attributed to the defendants. See also Louisiana Farmers' Protective Union, Inc. v. Great A. & P. Tea Co., Inc., et al., 31 F. Supp. 483 (Summary No. 8, page 3). The suit was one which was instituted by the Louisiana Farmers' Protective Union, Inc., for treble damages for violation of the Sherman Anti-Trust Act, the Clayton Act, and the Robinson-Patman Act, and was based upon oral assignments by some 8,000 members of the Union on the ground that the defendants had "resorted to a merchandising technique of using strawberries as 'loss leaders' to destroy competition and create monopoly."

Following the dismissal of the complaint, the case was appealed to the Circuit Court of Appeals for the 8th Circuit and in 131 F. 2d 419 the judgment of the lower court was reversed because that court was of the opinion that the plaintiff should have an opportunity to present evidence for the purpose of establishing, if possible, the allegations of its complaint.

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In Farmers Co-Op. Oil Co. v. Socony-Vacuum Oil Co., 133 F.2d 101, the Circuit Court of Appeals for the Eighth Circuit affirmed the action of the District Court, 43 F. Supp. 735 (Summary No. 15, page 6), in holding that the Iowa cooperative involved could not, by virtue of its cooperative character, maintain an action for treble damages under the Sherman Anti-Trust Act on account of damages suffered by its individual members due to the fact that they were required to pay a higher price for gasoline, as the "right of action belongs to the member customers of the plaintiff." The case was, however,

> remanded with instructions to modify the judgment appealed from by granting plaintiff a reasonable time in which to amend the complaint, if it is so advised, by setting out its own cause of action and the causes of action and damages sustained by as many of its stockholders as may elect to join as parties plaintiff, and for further proceedings consistent with this opinion.

Agricultural Labor-- Employment Taxes

Federal employment taxes are not required to be paid in connection with agricultural labor. There follows a copy of a ruling, with respect to what constitutes agricultural labor, involving a cooperative association, given by the Bureau of Internal Revenue and found in Internal Revenue Bulletin No. 46 on page 13:

EMPLOYMENT TAXES.

INTERNAL REVENUE CODE.

Chapter 9, Subchapter A.--Federal Insurance Contributions Act.
Section 1426: Definitions. 1940-46-10487
Regulations 106, Section 402.208 Agricultural labor. S.S.T. 405
(Also Subchapter C (Federal Unemployment Tax Act), Section 1607; Regulations 107, Section 403.208.)

Status of various types of services rendered by employees of a cooperative association of fruit and vegetable growers for purposes of Subchapters A and C, Chapter 9, of the Internal Revenue Code, as amended by the Social Security Act Amendments of 1939.

Advice is requested whether various types of services rendered by employees of the M Association, a cooperative organization of fruit and vegetable growers, are excepted from "employment" as "agricultural labor" for purposes of Subchapters A and C, Chapter 9, of the Internal Revenue Code, as amended by the Social Security Act Amendments of 1939.

The association supervises the activities of its members and performs services from the beginning of the growing period until the products are on their way to market. It employs inspectors who advise the growers with respect to production methods, obtain crop estimates from time to time for financing purposes, and during the packing and processing season supervise the grading and packing of the products and check the condition of those in storage. It aids the growers in financing the growing, harvesting, and processing of their products, purchases materials and supplies, and stores them until

needed by the growers, at which time they are distributed to the growers by truck.

The association manufactures spray materials which it sells exclusively to its members at cost. It also manufactures cider and vinegar from apples raised exclusively by its members. It packs apples, pears, cherries, potatoes, and other fruits and vegetables, all of which are raised by its members. The association operates a cannery in which it handles only fruits and vegetables produced by its members, and a cold storage warehouse in which its members' products are held for market after they are processed and packed. Ice is manufactured for freight cars carrying the products to market and some electricity is generated for use in the above-mentioned plants. A reservoir and pipe line owned and operated by the association furnish water for power and other purposes in its plants. The association sells a small amount of ice and furnishes some water to a railroad company for the latter's engines. The net returns from these operations aid in reducing the cost of the above-mentioned services to the members of the association. The association employs, among others, department managers, sales promotion men, accountants, clerical workers, and maintenance men.

Upon the basis of the facts presented and in view of the provisions of sections 1426(h) and 1607(l) of the Code, as amended, it is held that services performed by employees of the M Association in connection with the cultivation of the soil and the raising and harvesting of products on the farms of its members, and in packing, packaging, processing, grading, storing (including the actual canning equipment), and delivering to storage or to market, or to a carrier for transportation to market, the fruits and vegetables produced by its members, together with services rendered by officers and other employees of the association in the direct supervision of such services, constitute "agricultural labor" for purposes of Subchapters A and C, Chapter 9, of the Code, as amended.

It is also held that services performed by employees of the M Association in connection with the canning of the products of its members, the manufacture of spray materials, cider, vinegar, and ice, the generation of electricity, the operation of the reservoir and pipe line under the

> circumstances stated, the inspection of members' crops, the furnishing of advice to members, the promotion of sales, the repair of the plants and equipment, and clerical work, together with the supervision of such services, constitute "employment" for purposes of such subchapters.

For a fuller discussion of this matter, see "Liability of Cooperative Associations for Payment of Federal Security Taxes", Summary No. 8, page 1.

In Jones v. Gaylord Guernsey Farms, 128 F.2d 1011, it was held that bottlers and coolers of milk, and carpenters and truckmen on the employer's farm were engaged in agricultural labor, but that a stenographer employed part time at the taxpayer's downtown office who devoted her time to the registration of cattle, keeping records of pedigreed stock, answering telephone calls relative to milk orders and handling correspondence in regard to cattle sales, was not engaged in agricultural labor within the meaning of the exemption.

Following the opinion of the court in Batt v. Unemployment Compensation Division (Idaho) 123 P. 2d 104, in 139 A.L.R. 1164 will be found a comprehensive note on "What constitutes 'agricultural labor' or 'farm labor' within social security or unemployment compensation acts."